YONG BENG CREDIT SDN. BHD.

v.

TIA CHONG KING @ TAY CHONG KENG T/A POLYSAN CO.

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[CIVIL SUIT NO. 22-199-1989]
8 JULY 1993

PRACTICE & PROCEDURE: Application for dismissal of action - Order for summons for directions obtained by defendant - Order 25 of RHC - Compliance by plaintiff with order after 1 year - Whether out of time - Application for dismissal for want of prosecution - Delay before issue of writ - Relevance - Expiry of limitation period - Section 6 Limitation Act 1953 - Plaintiff unable to issue fresh writ before expiry of period - Relevance - Delay in prosecuting action after issue of writ - No explanation or reason given - Whether delay inordinate and inexcusable - Whether would prejudice defendant.

The plaintiff filed a writ on 17 August 1989, against the defendant, claiming, *inter alia*, for a loan given to the defendant, who had a valid moneylender's licence and was the managing director of the plaintiff. On the same date, the plaintiff obtained an interim injunction against the defendant to restrain him from dealing with any money standing in his personal account or in the account of his sole proprietorship.

The defendant entered appearance on 19 August 1989. He filed his defence and counterclaim on 22 August 1989. On the same date, he filed a summons in chambers to set aside the interim injunction, which was subsequently discharged by consent. On 21 October 1989, the defendant took out a summons for directions pursuant to O. 25 of RHC.

The plaintiff filed defence to the counterclaim and 'counterclaim' to the counterclaim of the defendant on 5 February 1990. On 10 February 1990, he filed summons in chambers under O. 14 of RHC for summary judgment.

On 20 February 1990, the defendant filed reply to the plaintiff's defence to counterclaim and defendant's defence to the plaintiff's 'counterclaim'. On 5 May 1990, the application under O. 14 was dismissed with costs. An appeal was similarly dismissed.

The order in respect of the summons for directions was given on 26 January 1991. On 19 February 1992, the plaintiff filed an affidavit verifying list of documents. But he refused to allow inspection of documents unless the defendant withdrew his application for dismissal of the action. Most documents in the plaintiff's possession were not made available to be defendant till the date of the hearing of the application for dismissal of the action.

On 27 February 1992, the defendant took out a summons for dismissal of the plaintiff's action for want of prosecution.

On 25 April 1992, the plaintiff filed the request for setting down the action for trial and its notification.

On 27 June 1992, the defendant filed a supplementary affidavit alleging, *inter alia*, non-compliance with the summons for directions, inordinate delay and other grounds in support of the dismissal of the action.

Held:

[1] The plaintiff had failed to comply with the order dated 26 January 1991. The request for and notification of setting down the action for trial was about a year out of time.

[2] Even if the plaintiff could be held to have complied with the order though late, in the circumstance of the case this was a proper case where the Court should exercise its discretionary powers and under its inherent jurisdiction dismiss the action for want of prosecution.

[3] There had been undue delay in bringing the action. Assuming the cause of action arose only in 1985, based on the defendant's acknowledgment of the purported debt in 1985, and that the plaintiff's action would have been barred only in 1991, it was clear that the plaintiff could not avail themselves of their legal right to issue a fresh writ as the period of limitation would have set in. This was brought about by their delay in filing the action itself in 1989. Under s. 6(1) of the Limitation Act 1953, the limitation period for bringing an action founded on contract is six years from the date on which the cause of action accrued.

[4] The delay after the issue of the writ in the prosecution of the action had been inordinate and inexcusable and would even constitute an abuse of the process of the Court. The plaintiff had failed to proceed promptly with the successive steps in the action as ordered in accordance to RHC. Furthermore, no explanation or reason

was given for the delay in complying with the order of the Court.

[5] The defendant would be prejudiced as a result of the delay. There was a substantial risk that it would not be possible for the defendant to have a fair trial of the issues in the action. Witnesses would have left the plaintiff's employment, and there was a real risk that documents still in the plaintiff's possession would be tampered with. There was also blatant disregard of the order made by the Court.

[6] Whatever remedy the plaintiff may have against their solicitor was not a relevant consideration insofar as the defendant's application was concerned.

[Defendant's application allowed with costs].

Cases referred to:
Birkett v. James [1977] 2 All ER 801 ***(foll)***
Allen v. McAlpine [1968] 1 All ER 543 ***(refd)***
Parker Ltd. v. FJ Ham & Son Ltd. [1972] 3 All ER 1051 ***(foll)***

Legislation referred to:
Limitation Act 1953, s. 6(1)
Rules of the High Court 1980, O. 14, O. 18 r. 19, O. 25, O. 42 r. 7
Rules of the Supreme Court, O. 15 r. 2(5) UK

For the plaintiff - Gary Yuen; M/s. Gary Yuen & Tan
For the defendant - P.H. Ong; M/s. Ong & Ong

JUDGMENT

Haidar bin Mohd Noor J:
The plaintiff appealed against my order allowing the defendant's application (encl.67) for dismissal of the plaintiff's claim/action for want of prosecution. By encl. 67 it is clear that the principal ground relied on by the defendant is the failure by the plaintiff to comply with the terms of the summons for directions dated 26 January 1991, alternatively, there was excessive delay on the part of the plaintiff in the prosecution of the action. I indicated to the Counsel for the defendant that it was not in order for her to state in her written submission to the Court that encl. 67 was made pursuant to O. 18 r. 19 of the Rules of the High Court 1980 ('RHC') as a perusal of encl. 67 would show that it was not so. I therefore proceeded on the basis of what I stated earlier on, i.e the ground as set out in encl. 67. The defendant's application is supported by the affidavit of the defendant himself (encl. 68).

Facts

Before proceeding further, it is best that I set out the facts leading to the defendant's application before me.

The plaintiff filed the writ on 17 August 1989 against the defendant claiming, *inter alia*, for a loan given to the defendant to be loaned to Loo Eu (since deceased), Lim Tian Fow, Siah Ah Loy and Sia Ang Luy ("borrowers") as the plaintiff admitted that in the year 1990 the plaintiff had not renewed their moneylender's licence and could not therefore lend the money to the borrowers. The alleged loan was for RM140,000. The defendant at the material time personally had a valid moneylender's licence and was also the managing director of the plaintiff. The loan was to be for one month i.e. from 19 May 1980 to 18 June 1980. It was also agreed, according to the plaintiff, that a charge on a piece of property held under lot 571, Grant No. 6041 Mukim Gemas, District of Gemas, Johor by way of security be executed for the purpose of the loan. It was also claimed by the plaintiff that the defendant was at all times acting as a trustee cum agent for the plaintiff. Subsequently the borrowers defaulted in their repayment to the defendant wherein the charged property was sold for RM180,000 by public auction on 24 December 1988. The plaintiff alleged that they paid for the costs and expenses in respect of the auction sale and the defendant collected RM180,000 minus the expenses from M/s S.K. Song, solicitors handling the order for sale. The plaintiff claimed that the defendant has failed to pay them the sum of RM180,000 minus the expenses for costs etc. from the order for sale for which they are now claiming in this writ plus interest and costs.

On 17 August 1989 itself the plaintiff also filed an *ex-parte* summons in chambers for an injunction against the defendant, *inter alia*, to restrain the defendant by himself etc. from disposing or dealing with any money standing to his credit in the defendant's personal name or in the name of his sole proprietorship of Polysan Co., with the branch at Taman Maju Jaya, Johor Bahru of Southern Bank Berhad, Johor in so far as the sum standing to their credit with the said bank shall exceed RM180,000 until after the trial of this action or until further other. An injunctive order was accordingly obtained by the plaintiff on 17 August 1989 itself (encl. 8).

The defendant entered appearance on 19 August 1989 (encl. 10). The defendant filed his

defence and counterclaim dated 22 August 1989 and from encl. (11) it was registered on 28 August 1989. On 22 August 1989 the defendant filed a summons in chambers (encl. 13) to set aside the interim injunction obtained by the plaintiff on 17 August 1989. From encl. 13 it was registered only on 9 September 1989. The summons was supported by the affidavit of the defendant himself. (encl. 12). Subsequently on 13 September 1989, by consent, the injunction granted on 17 August 1989 was discharged forthwith with no order as to costs and no claim for damages.

On 21 October 1989 the defendant took out a summons for directions pursuant to O. 25 of RHC. The order in respect of the summons for directions was given on 26 January 1991 by the Senior Assistant Registrar. I will revert to the details of the order later.

The plaintiff filed defence to counterclaim and also counterclaim to counterclaim dated 5 February 1990. (encl. 34). Just to digress a bit I questioned Counsel for the plaintiff on the plaintiff's " counterclaim" to counterclaim of the defendant. He indicated to me that he was relying on the English O. 15 r. 2(5) wherein I intimated to him that there is no similar provision in our RHC and in fact it had been deleted. He promised to look further and I left it at that as it was not relevant for the purpose of the defendant's application before me.

On 10 February 1990 the plaintiff filed summons in chambers under O. 14 of RHC for summary judgment. It is supported by the affidavit of Goh Im Moe, chairman of the plaintiff. (encl. 37).

On 20 February 1990 the defendant filed reply to plaintiff's defence to counterclaim and defendant's defence to plaintiff's "counterclaim". (encl. 39). There was an affidavit in reply filed by the defendant on 9 March 1990 and a further affidavit filed by Goh Im Moe on 22 March 1990. (encl 43). There was yet another affidavit filed by the defendant on 4 April 1990 (encl. 44).

On 5 May 1990 the plaintiff's application under Order 14 was dismissed with costs by the Senior Assistant Registrar. The plaintiff appealed against the decision of the Senior Assistant Registrar on 5 May 1990 (encl. 46). On 10 October 1990 the appeal was dismissed with costs.

Coming back to the summons for directions, the order was extracted by the defendant. (encl. 65). There were a number of orders given for the parties to take action.

On 27 February 1992 the defendant took out summons in chambers (encl. 67) for dismissal of the plaintiff's claim/action for want of prosecution and supported by the affidavit of the defendant himself.

On 19 February 1992 the plaintiff filed an affidavit verifying list of documents. There seemed to be a bit of confusion as to the date of filing of the application of the defendant to dismiss the plaintiff's claim/action. The date as recorded in encl. (67) is 27 February 1992 and the affidavit in support is dated 22 January 1992 and according to the letter of defendant's Counsel dated 3 March 1992 (encl. 71) the application (encl. 67) was filed on 25 January 1991 and thereby expressing surprise that the plaintiff's affidavit verifying list of documents was registered on 19 February 1992 and plaintiff's Counsel served it on defendant's Counsel on 28 February 1992. It would appear that the defendant's application has not been returned to defendant's Counsel even though it was filed one month earlier as claimed in the said letter of the defendant's Counsel.

Be that as it may, on 25 April 1992 the plaintiff filed the request for setting down action for trial and the notification of setting down action for trial. (encls. 73 & 74).

On 1 July 1992 the plaintiff's Counsel filed an affidavit in reply to the application of the defendant. The plaintiff's Counsel in the affidavit admitted that there was a delay in proceeding with the setting down, that is, from 2 January 1992 to 19 February 1992 about 47 days' delay and asserting that such delay cannot be considered to be serious or inordinate as no detriment had been caused to the defendant. In any event the plaintiff's Counsel claimed that the relevant documents had been filed and served and the defendant has not suffered whatsoever.

On 27 June 1992 the defendant filed a supplementary affidavit (encl. 82) alleging, *inter alia*, non-compliance with the summons for directions, inordinate delay that will give rise to a substantial risk that a fair trial would not be possible giving the grounds thereto and the plaintiff's suit, if dismissed, will be time-barred.

The order for summons for directions takes effect on January 26, 1991 (see O. 42 r. 7 (1) of RHC). It was submitted by the defendants'

Counsel that the following orders as per the order for summons for directions have not been complied with:

(i) It was ordered that the plaintiff "within 60 days serve on the defendant a list of documents and file an affidavit verifying such list." The plaintiff ought to have filed the list and the affidavit by 27 March 1991 (26 January 1991 + 60 days) pursuant to the order of Court dated 26 January 1991.

The plaintiff filed the affidavit verifying the list of documents only on 24 February 1992 and the list of documents (according to the Court's copy, it was not dated) (see encl.70). The plaintiff appeared to have filed the same out of time by 11 months and 3 days (27 March 1991 to 24 February 1992) thereby failing to comply with the order of Court dated 26 January 1991.

(ii) It was ordered that " there be inspection of documents within 30 days of the service of the said list and the filing of the affidavit." The plaintiff did not allow the defendant inspection of the documents despite the notice of inspection. The said refusal is exhibited as TCK in encl. 82. The refusal it was submitted was unjustifiable and without basis. Again failure to comply with the order dated 26 January 1991.

(iii) It was ordered that "the matter be set down for trial within 90 days" of the order dated 26 January 1991. It ought therefore to have been set down for trial by 28 April 1991 (27 January 1991 + 90 days).

The request and notification of setting down action for trial was duly filed on or about 25 April 1992 (encl. 73 & 74). It would appear to be about a year out of time. Hence the plaintiff failed to comply with the order dated 26 January 1991.

The Law

In considering the application of the defendant to dismiss the action for want of prosecution the judgment of the House of Lords in *Birkett v. James* [1977] 2 All ER 801 would be of great assistance. Lord Diplock at page 804 said:

> Although the Rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for directions and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution, except on disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.
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> To remedy this High Court Judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in *Reggentin v. Beecholme Bakeries Ltd* [1968] 1 All ER 566 (reported in a note to *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543 and *Fitzpatrick v. Batger & Co. Ltd* [1967] 2 All ER 657).
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> The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer to as *Allen v. McAlpine,* the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately in the note to RSC O. 25, r. 1, of the current **White Book (Supreme Court Practice 1976,** Vol. 1, pp. 424-427). The power should be exercised only where the Court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

In *Birkett v. James* [1977] 2 All ER 801 the House of Lords did not consider contumelious default as it was not relied on by the defendant. However, Lork Diplock said that three points which have assumed importance in subsequent cases were left undecided by *Allen v. McAlpine* [1968] 1 All ER 543. They were:

(1) the relevance of the fact that the limitation period had not expired by the time the

appli-cation to dismiss for want of prosecution was heard;
(2) the relevance of the period which the plaintiff had allowed to elapse before action was brought, when this was done within the limitation period, and;
(3) whether the Judge ought to weigh the plaintiff's prospects of success in any remedy he might have against his solicitor if the action were dismissed and if so, how his estimate should affect the exercise of his discretion.

Though it would seem clear that the plaintiff did not comply with the order for summons for directions as set out by me earlier on, it would seem equally clear that by the time the defendant's application was heard the plaintiff ultimately complied with the said order though late it may be or perhaps after the plaintiff got wind of the application of the defendant. In this case no peremptory order was made and in the circumstances the relevant consideration would be to look at the three points pointed out by Lord Diplock.

The relevant fact to consider is the non-expiry of the limitation period. Lord Diplock in *Birkett v. James* [1977] 2 ALL ER at p. 808 said:

> For my part, for reasons that I have already stated, I am of opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff is involved; and the cases where it is likely that if the action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ, the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending.

From the pleadings, the cause of action arose on 19 June 1980 when the defendant defaulted in the payment. The plaintiff filed the writ on 17 August 1989. Under s. 6(1) of the Limitation Act 1953 the limitation period for bringing an action founded on contract is six years from the date on which the cause of action accrued. In that event by June 18, 1986 the plaintiff is time barred to bring this action. However, even if the plaintiff is allowed to rely on the two cheques dated 18 July 1983 and 22 July 1983 as acknowledging the purported debt and reviving the limitation period by the defendant the cause of action arose on 29 July 1983 (according to defendant's Counsel, this is taking into account the period of clearance of the cheques say, about one week). If that be the case the limitation sets in by 28 July 1989 in which case the plaintiff would be out of time by about 20 days. Even assuming that the cause of action arose in 1985 based on the defendant's acknowledgment of the purported debt in 1985 which means that the plaintiff's action will be time barred only in 1991. At the time of the hearing of the defendant's application when the order was made for dismissal of action for want of prosecution it would seem clear that the plaintiff could not avail themselves of their legal right to issue a fresh writ as the period of limitation would set in. This is brought about by their delay in filing the action itself in 1989. In the circumstances on this ground alone I should say that the defendant should succeed in his application.

In relation to the justification in respect of dismissal of action for want of prosecution the delay relied on must relate to time which a plaintiff allows to lapse unnecessarily after the writ has been issued. On the question of whether or not it need be shown that delay in prosecuting the action after the issue of the writ had added anything to the prejudice which a defendant would have sustained in any event from the late issue of the writ however diligently the action were to be prosecuted thereafter, Lord Diplock in *Birkett v. James* [1977] 2 All ER at p. 809 preferred to follow the principle laid down in *William C Parker Ltd v. F J Ham & Son Ltd.* [1972] 3 All ER 1051. His Lordship stated:

> to justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown to have resulted from his subsequent delay (beyond the period allowed by rules of Court) in proceeding promptly with the successive steps in the action. The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued; but it must not be minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by rules of court for taking that step.

In this case it would seem to show that the plaintiff has failed to proceed promptly with the successive steps in the action as ordered in accordance to RHC and further, in their reply to the defendant's present application no explanation or reason was given for the delay in complying with the order of the Court. It is interesting

to note that after the pleadings are deemed closed on 5 September 1989 and after the defendant's solicitor took out summons for directions on 21 October 1989 the plaintiff proceeded to file the Order 14 application on 10 February 1990 (encl. 36) which was subsequently dismissed on appeal on 8 October 1990. The order pursuant to the summons for direction was given on 1 January 1991 and the defendant ultimately complied with the said order on 24 April 1992, a lapse of about one year. In the circumstances I am of the view that the delay is inordinate and inexcusable and would even constitute an abuse of the process of the Court. The next relevant issue is whether the defendant has been or would be prejudiced by such delay. According to the defendant's affidavit (paragraph 3 (B) (i) (a), (b), (c) in encl. 82) the delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action. The delay would prejudice the defendant as all the witnesses have left the employ of the plaintiff and most documents (ledgers, payment vouchers, official receipt copies etc.) being in the plaintiff's possession have not been made available to the defendant till the date of the hearing of this application. According to the defendant there is a real risk that the accounts will be tampered with. The plaintiff did not reply to the allegations of the defendant in encl. 82 and in that event I would have to take it that the defendant's allegations remained unchallanged. Even as at 3 March 1992 the plaintiff *vide* exhibit TCK-1 (encl. 82) refused to allow inspection of documents unless the defendant withdraws his present application - a condition imposed by the plaintiff without having regard to the order made by the Court. It shows a blatant disregard of the order of the Court and the RHC. If this is not an abuse of the process of the Court, I do not know what is. I am of the view that in the circumstances this is a proper case where the Court should exercise its discretionary powers and under its inherent jurisdiction the action should be dismissed for want of prosecution. In considering the dismissal of the action, what remedy the plaintiff has against their solicitor is an irrelevant consideration (see *Birkett v. James* [1977] 2 All ER at p. 809).

For the reasons set out by me I allowed the application of the defendant with costs.

Reported by Shamsiah Begum Subhan